TAN HEE SENG CONSTRUCTION PTE LTD *a*

v.

SUN GUAN ENTERPRISE

HIGH COURT SABAH & SARAWAK, SIBU *b*
TEE AH SING J
[SUIT NO: 22-08 OF 1995]
24 JANUARY 2000

CIVIL PROCEDURE: *Execution - Stay - Application for - Whether defendant had shown special circumstances - Whether grounds for setting aside consent judgment sufficient to establish special circumstances - Rules of the High Court 1980, O. 47* *c*

This was an application by the defendant under O. 47 and O. 55 of the Rules of the High Court 1980 for a stay of execution of a judgment dated 29 July 1998 entered against the defendant so far as it affected one Soh Ah Bah @ Soh Hong Kim; and alternatively a stay of execution of the judgment dated 29 July 1998 entered against the defendant pending the disposal of the defendant's suit to set aside the said judgment. *d*

The grounds of the application are that: (i) Soh Ah Bah @ Soh Hong Kim, a partner of the defendant, was never served with the writ of summons taken up by the plaintiff in this action and he had not made an appearance to this action; (ii) the defendant had not authorised the entry of the consent judgment dated 29 July 1998; (iii) the claims of the plaintiff were tainted with fraud. *e* *f*

Held:

[1] Under O. 47 of the Rules of the High Court 1980, the court has an absolute and unfettered discretion in deciding whether to grant or refuse a stay. An application for a stay must be supported by an affidavit stating special circumstances. The court will not deprive a successful party the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it. *g*

[2] Grounds affecting the validity or correctness of a consent judgment are not special circumstances. *h*

[2a] The allegations made by the defendant were more relevant as grounds for setting aside the consent judgment, rather than amounting to special circumstances justifying the stay. *i*

[Application dismissed.]

Case(s) referred to:

Abdul Halim Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors [1996] 4 MLJ 54 ***(refd)***

Ajaib Singh v. Jeffrey Fernandez [1971] 1 MLJ 139 ***(refd)***

Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584 ***(refd)***

Dr Kok Chee Min v. Kan Choy Yoong & Ors [1994] 3 CLJ 308 ***(foll)***

Government of Malaysia v. Datuk Hj Kadir Mohamad Mastan & Another Application [1993] 4 CLJ 98 ***(refd)***

Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 ***(refd)***

Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 ***(refd)***

Monk v. Bartram [1891] 1 QB 346 ***(refd)***

Official Assignee of the Property of Mohamed Yunus, A bankrupt v. Mohamed Shariff Valibhoy - Mallal's Digest 1992, para 276 ***(refd)***

Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238 ***(refd)***

Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 ***(refd)***

Serangoon Garden Estate Ltd v. Ang Keng [1953] MLJ 116 ***(refd)***

United Overseas Bank Ltd v. Joo Hin Leong [1978] 2 MLJ 202 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 47 r. 1(a), O. 55 r. 12, O. 92 r. 4

For the plaintiff - Marina Foo M/s Tang & Partners
For the defendant - George Lim; M/s Battenberg & Talma Advoc

Reported by Mariette Peters-Goh

JUDGMENT

Tee Ah Sing J:

This is an application by the defendant under O. 47 r. 1 of the Rules of the High Court 1980 ("the RHC") and O. 55 r. 12 of the RHC for a stay of execution of the judgment dated 29 July 1998 entered against the defendant in so far as it affects Soh Ah Bah @ Soh Hong Kim, a partner of the defendant and alternatively a stay of execution of the judgment dated 29 July 1998 entered against the defendant pending the disposal of the defendant's suit to set aside the said judgment.

The grounds of the application are:

1. Soh Ah Bah @ Soh Hong Kim a partner of the defendant was never served with the writ of summons taken up by the plaintiff in this action and he had not made any appearance to this action.

2. The defendant has not authorised the entry of the consent judgment on 29 July 1998.

3. The claims of the plaintiff were tainted with fraud.

The application is supported by the affidavits of David C.C. Tiong affirmed on 13 May 1999, the affidavit in support (No. 1) of Soh Ah Bah @ Soh Hong Kim affirmed on 4 May 1999 and the affidavit in support (No. 2) of Ting Bang Huang affirmed on 3 May 1999.

An affidavit was affirmed by Sin Yaw Yen on 3 June 1999 on behalf of the plaintiff.

The learned counsel for the defendant in his written submission contended, *inter alia,* as follows:

1. This application for stay is appropriate in view of the fact that the defendant has taken fresh proceedings in Civil Suit No. 22-41 of 1999 to impeach the judgment dated 29 July 1998. The said writ was sealed on 21 June 1999 and a copy released to the defendant on 25 June 1999 and hence is not annexed to the affidavit and could not be served on time for the hearing of the present application. Nonetheless he invited the court to take judicial notice of the existence of the writ and the action taken to set aside the consent judgment.

2. The court has the power to stay pursuant to O. 47 r. 1 and O. 92 r. 4 of the RHC to allow stay. The law governing stay is extensively set out in the judgment of Ian HC Chin JC in *Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan & Another Application* [1993] 4 CLJ 98.

3. The facts of this case from the manners in the commencement of the action, the service of the writ, the entry of default judgment, the entry of appearance and the filing of the defence by Ting Bang Huang, the entry of the consent judgment and the subsequent execution of the judgment against only one member of the defendant who was not even served with the writ and the judgment bring this case within the category of what Raja Azlan Shah J (as his majesty then was) in the case of *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86.

4. This case has considerable merit for the defendant to impeach the judgment on ground of fraud. The plaintiff filed no affidavit to dispute the several allegations made by Soh Ah Bah @ Soh Hong Kim in his affidavit affirmed on 4 May 1999 and the affidavit of Ting Bang Huang affirmed on 3 May 1999. If such positive averments of the applicants

or deponents remained unchallenged or uncontradicted, the allegations must then be assumed to be true. In support the following cases were cited:

(a) *Overseas Investment Pte. Ltd. v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238.

(b) *Sakapp Commodities (M) Sdn. Bhd. v. Cecil Abraham* [1998] 4 CLJ 812.

In any event the affidavits led to a stalemate and this court can only look to the undisputed facts. (See the case of *Abdul Halim bin Abdul Hanan & Ors. v. Pengarah Penjara, Taiping & Ors.* [1996] 4 MLJ 54.)

The plaintiff obtained judgment and now seeks to execute the judgment. It has not even registered the judgment in Singapore, but nonetheless seek to execute the judgment and claim the whole of the judgment from one single partner who had not been served with the writ of summons taken out or served with a copy of the judgment. The plaintiff knew its managing director Tan Hee Seng is liable for part of the judgment but chose to claim the whole from Soh Ah Bah. This is the clearest of evidence of fraud on the defendant firm and the court should not allow its machinery to be used to perpetuate fraud.

The circumstances here are therefore special on the facts of this case. This is the case of a single personality who uses the instrument of the court to enforce judgment against a single partner since he is not claiming from himself and he knew the other (Ting Bang Huang) cannot pay because he is an undischarged bankrupt. The stay sought by Soh Ah Bah is the only relief he had in the meantime until the consent judgment can be impeached and set aside, to restrain the plaintiff from using the legitimacy of the law to achieve an unjust result for the personal gain of the plaintiff.

The learned counsel for the plaintiff in his written submission contended, *inter alia,* as follows:

1. The defendant's application is dated 14 May 1999 whereas the defendant's suit (Civil Suit No. 22-41-99) to set aside the consent judgment was filed on 21 September 1999. Therefore on 14 May 1999 the defendant's suit, was not in existence, so the defendant's application is premature in respect of the second prayer.

2. The judgment was entered on 28 July 1998 and the application was made only on 14 May 1999. The defendant's application was not made promptly. The defendant's application ought to be struck out because the plaintiff has been prejudiced for having already attempted to execute the judgment and had thus expended money by so doing. (See *Ajaib Singh v. Jeffrey Fernandez* [1971] 1 MLJ 139.)

3. No affidavit of special circumstances shown. All the information affirmed in the defendant's affidavit affects the validity or correctness of the judgment. Such information are not special circumstances. Merits or strong ground for an appeal, validity or correctness of the judgment are not special circumstances. (See *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd.* [1989] 2 CLJ 584.)

4. Order 55 r. 12 of the RHC does not apply as there was no appeal made.

5. There is no right of appeal in a consent judgment. (See *United Overseas Bank Ltd. v. Joo Hin Leong* [1978] 2 MLJ 202.)

6. A final judgment can be set aside if obtained by fraud or new evidence has been discovered. (See *Official Assignee of the Property of Mohamed Yunus, A Bankrupt v. Mohamed Shariff Valibhoy – Mallal's Digest* [1992] para. 276).

7. Principle governing actions to set aside consent order/judgment – "Court will apply the same principles as if judgment was a contract or compromise of which rescission is sought."

8. The allegations in the affidavit of David Tiong that he did not have any authority to enter judgment is contrary to all documentary evidence as evidenced by the documents filed in court by David Tiong. In *Dr. Kok Chee Min v. Kan Choy Yoong & Ors* [1994] 3 CLJ 308 wherein consent judgment was entered and the appellant alleged that the consent judgment was wrongfully entered. The mistake lay with counsel who negligently advised the appellant to enter the consent judgment. The court held that the appellant's remedy is against the negligent counsel and not against the magistrate and thus the consent judgment must nevertheless be obeyed.

The learned counsel for the defendant has stated that the plaintiff wanted to execute the judgment against one single partner of the defendant and by so doing the defendant's counsel is saying that that is the clearest of evidence of fraud. In reply the learned counsel for the plaintiff submitted that the plaintiff has the prerogative to execute judgment against the defendant and as such the question of fraud is non-existent.

The learned counsel for the defendant in reply submitted that he disagreed with the submission of the plaintiff that in an application for stay pending the disposal of the suit, the suit must then be in existence. While it is the prerogative of the successful judgment holder to execute the judgment it is quite a different matter when the plaintiff has used the machinery of the judicial system in circumstances amounting to fraud to get judgment and then execute against an innocent partner.

I shall now deal with the matter before me.

Order 55 r. 12 of the RHC reads as follows:

> An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the Court appealed from or the High Court may order, and any application for stay shall be made in the first instance to the Court appealed from.

In our case the defendant has not filed any notice of appeal. As such I am of the view that O. 55 r. 12 of the RHC does not apply.

In the present case the applicable rule is O. 47 r. 1(1)(a) of the RHC. Under O. 47 r. 1(1)(a) of the RHC in an application to stay execution of judgment the defendant must show that there are special circumstances.

The court has power to grant a stay and this is entirely in the discretion of the court, but the discretion must be exercised in accordance with established principles.

In *Kerajaan Malaysia v. Dato' Haji Ghani Gilong* [1995] 3 CLJ 161 His Lordship Edgar Joseph Jr. FCJ (delivering the judgment of the Federal Court) at p. 169 said:

> We noted, that the instant appeal, there was no formal application for stay supported by an affidavit affirmed by the taxpayer or his duly authorised agent, alleging special circumstances to justify the making of the order for stay. In other words, although the onus was upon the taxpayer to demonstrate special circumstances justifying a stay, there was no material upon which the judge could have granted the order for a stay. The *Jasanusa* case, was therefore readily distinguishable, on the facts. We thus had no option but to discharge the order for stay.

The allegation of David C.C Tiong that he was the advocate for Ting Bang Huang only and not the defendant partnership is not special circumstances and it is more relevant as a ground for setting aside the consent judgment. The allegation of Ting Bang Huang that he instructed Mr. David C.C. Tiong to act for him in his personal capacity and not the defendant partnership is also not special circumstances and it is more relevant as a ground for setting aside the consent judgment.

The allegations of Mr. Soh Ah Bah that he was not personally served with the writ of summons or any other processes and has not made an appearance to the action or that Mr. David C.C. Tiong did not have the mandate for and on behalf of the defendant partnership to appear for the defendant partnership and record the consent judgment of 29 July 1998 were not special circumstances as they did not relate to the enforcement of the consent judgment itself but were more relevant as grounds for setting aside the consent judgment.

Similarly, the allegation of fraud committed by Tan Heng Seng is not special circumstances but more relevant as a ground for setting aside the consent judgment.

In *Dr. Kok Chee Min v. Kan Choy Yoong & Ors* [1994] 3 CLJ 308 His Lordship Abdul Malik Ishak JC (as he then was) at pp. 311 and 312 said:

> Next, it was also averred in the affidavit of the appellant in encl. 3A that there were merits or strong grounds for an appeal and that there were grounds affecting the validity or correctness of the consent judgment and, consequently, a stay for execution should be granted.
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> It is now established that the court has an absolute and unfettered discretion in deciding whether to grant or refuse a stay. And that an application for a stay must always be supported by an affidavit of special circumstances (*Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86). It is further established by a long line of authorities that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it (see for instance, *Serangoon Garden Estate Ltd. v. Ang Keng* [1953] MLJ 116). *16 Halsbury's Laws of England* (3rd edn) at p. 35 states:
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> > The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.
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> See also *Monk v. Bartram* [1891] 1 QB 346 which echoes the same principle. But the power of the court to stay is limited in its scope. This is supported by a passage appearing in *17 Halsbury's Laws of England* (4th edn) para. 451 at p. 270:
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> > ... the court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself.

> Thus, grounds affecting the validity or correctness of the consent judgment are not special circumstances. This is because, as was said by Lord Esher MR in *Atkins v. GW Ry* [1886] 2 TLR 400: 'Strong grounds for an appeal is no reason for a stay of execution, for no one ought to appeal without strong grounds for doing so.' In my judgment, neither merits or strong grounds for an appeal nor the validity or correctness of the judgment appealed from are special circumstances which would entitle the appellant a stay of execution.

In my view grounds affecting the validity or correctness of the consent judgment are not special circumstances.

In view of the aforesaid, I dismiss the defendant's application with costs to the plaintiff to be taxed unless agreed.